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CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 548

H. V. B. SMITH, C. D. RAFFERTY AND H. S. McCORMICK, CO-PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF H. J. BAKER & BRO.,

APPELLANTS AND CROSS-APPELLEES,

versus

MOTORSHIP "FERNCLIFF" AND GLITTRE AKTIESELSKABET AND FEARNLEY & EGER,

APPELLEES AND CROSS-APPELLANTS.

CROSS-APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
IN ADMIRALTY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Filed DEC 28 1938

United States Circuit Court of Appeals

FOURTH CIRCUIT.

No. 4385.

H. V. B. Smith, C. D. Rafferty and H. S. McCormick, co-partners trading and doing business under the firm name and style of H. J. Baker & Bro.,
Appellants and Cross-Appellees,

versus

Motorship "Ferncliff" and Glittre Aktieselskabet and Fearnley & Eger,
Appellees and Cross-Appellants.

Cross-Appeals from the District Court of the United States for the District of Maryland, at Baltimore.

Question certified to the Supreme Court of the United States by the Circuit Court of Appeals of the Fourth Circuit on the case stated.

Various questions have been raised by the appellants and cross-appellants in this case; but all but one of these have, in our opinion, been correctly decided by the court below for reasons adequately stated in the opinions of the District Judge. The remaining question, the extent of liability for cargo damage where the bill of lading contains a "true valuation" clause based on invoice cost, is one of such importance that, in view of division of opinion with regard thereto in this Court, we feel that it should be certified to the Supreme Court for decision:

STATEMENT OF FACTS.

This was a suit in admiralty to recover damages to shipments of fish meal made in March 1936 from points in Japan to consignees in Norfolk, Va. and Baltimore, Md. under bills of lading containing the following provision:

> "All claims for which the ship and or carrier may be liable shall be adjusted and settled on the value declared by the shipper or on the net invoice cost plus disbursements, whichever shall be the least. The carrier shall not be liable for any profit or consequential or special damages, and shall have the option of replacing any lost or damaged goods."

No lower rate was offered the shipper for the service rendered because of this provision; and no choice of rates with and without the valuation clause was afforded him.

The invoice cost of the fish meal was $32.50 per ton. The value of the damaged portion of the shipment upon arrival at the ports of destination was $25.00 per ton. The market value of undamaged fish meal at the ports of destination at the time of the arrival of the shipment was $36.00 per ton.

The court below held the valuation clause valid and computed the damages on the basis of the difference between the invoice cost ($32.50 per ton) and the value of the damaged fish meal at the time and place of delivery ($25.00 per ton).

Appellants, while not contending before us that the clause quoted is absolutely invalid, contend that in view of the decision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co.*, 294 U. S. 494, its validity can be sustained only if it be construed as requiring that, in estimating damages, the percentage of loss on the damaged shipment be ascertained and applied to the invoice cost. Under this contention, the loss here would be determined, not by deducting the value upon arrival ($25.00 per ton) from the invoice cost ($32.50 per ton), but by ascertaining the proportion of the invoice cost ($32.50) corresponding to the proportion which the actual loss ($36.00—$25.00—$11.00) bears to sound value ($36.00), i. e. by

taking 11/36 of $32.50. It is pointed out that this is the method used in calculating the amount of loss under a valued marine insurance policy on cargo and also the method prescribed by rule 16 of the York-Antwerp rules for a general average adjustment. And it was stated at the bar of the court by counsel for appellant that the same method has been generally employed in estimating cargo damage since the decision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co., supra.*

In the absence of the decision in the Ansaldo San Giorgio case, we should affirm the decision below on the authority of *Gulf C. & S. F. R. Co.* v. *Texas Packing Co.* 244 U. S. 31, 37; *Penn R. Co.* v. *Olivet Bros.* 243 U. S. 574, 586; *Hart* v. *Penn R. Co.* 112 U. S. 331; *The Californian,* 2 Cir. 82 F. 2d 283; *Duplan Silk Co.* v. *Lehigh Valley R. Co.,* 2 Cir. 223 F. 600; and *The Oneida,* 2 Cir. 128 F. 687. In view of that decision, however, we are divided and in doubt as to the validity of such a clause as is here involved and as to the method which should be employed in computing damages under it. Notwithstanding the passage of the Carriage of Goods by Sea Act of April 16, 1936, c. 229, sec. 4, 49 Stat. 1210, 46 USCA 1304(5), the question as to the correct method of computing damages under a valuation clause is deemed an important one, as to which an authoritative decision would seem desirable. We, therefore, respectfully certify to the Supreme Court of the United States the following questions of law as indispensable to a proper decision of this case:

QUESTIONS.

1. Is an invoice cost valuation clause, such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding upon the parties?

2. If so, should damages to a shipment be ascertained, under such a valuation clause, by deducting the value of the damaged goods in their damaged condition at the time and place of delivery from the invoice cost valuation as fixed by such clause?

3. Or, should the percentage of loss of the damaged

goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?

JOHN J PARKER,
United States Circuit Judge.

MORRIS A. SOPER,
United States Circuit Judge.

H. H. WATKINS,
United States District Judge.

Dec. 19, 1938

Endorsed:

"Filed and Entered
Dec. 20, 1938,
Claude M. Dean, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit."

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original certificate of the questions of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, on this 21st day of December, A. D., 1938.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.